

Honorable Lonny R. Suko

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON  
AT YAKIMA

CURT CLIFT,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

No. 2:14-cv-00152-LRS

STIPULATED PROTECTIVE  
ORDER REGARDING  
HANDLING OF  
CONFIDENTIAL AND  
ATTORNEYS' EYES ONLY  
MATERIAL

Pursuant to the stipulation between plaintiff Curt Clift ("Clift") and defendant BNSF Railway Company ("BNSF"), the parties believe that they may seek or be required to disclose to the other certain confidential, proprietary, and/or sensitive information in connection with this litigation, and that the unauthorized or improper use or disclosure of such information would be harmful to the parties or third parties, including BNSF's current and former employees. Accordingly, the Court grants the parties' stipulated motion, ECFR No. 35, and enters the following Stipulated Protective Order Regarding Handling of Confidential and Attorneys' Eyes Only Material ("Protective Order") under Fed. R. Civ. P. 26(c) to limit the use and disclosure of discovered

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1 information as provided herein.

2 IT IS HEREBY ORDERED as follows:

3 1. Scope. This Protective Order shall govern discovery in this action,  
4 and shall be applicable to the contents of all depositions, documents,  
5 information, or things produced in response to requests for production of  
6 documents, answers to interrogatories, responses to requests for admissions,  
7 third-party subpoenas, transcripts, exhibits, pleadings, and all other discovery  
8 taken in accordance with the Federal Rules of Civil Procedure, as well as  
9 testimony adduced at trial, matters in evidence, and other information that any  
10 party designates as confidential (“Confidential Material”) or as for attorneys’  
11 eyes only (“Attorneys Eyes Only Material”) under this Protective Order. As  
12 used herein, “designating party” refers to one of the parties to this action who  
13 designates any information as Confidential Material or Attorneys’ Eyes Only  
14 Material.

15 2. Confidential Material. The following information may be  
16 designated as Confidential Material:

17 a. personal or other personnel information regarding BNSF’s  
18 current or former employees, including Clift (including but not limited to  
19 contact information, evaluations, compensation and financial information,  
20 complaints, grievances, investigations, discipline, and other information in  
21 personnel files and other employee records; provided that such information may  
22 also warrant redaction before production by BNSF);

23 b. financial and business information about BNSF’s operations  
24 that is not generally available to the public;  
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1 c. information pertaining to a third party this is reasonably  
 2 believed to be personal or not generally available to the public, and that is  
 3 designated as Confidential Material in order to protect and preserve the interests  
 4 of such third party; and

5 d. information that either party is obligated by contract or state  
 6 or federal law to protect as confidential (provided that such information may in  
 7 some cases also qualify for designation as Attorneys' Eyes Only Material); and

8 e. other information that a party in good faith believes to be  
 9 confidential, proprietary, and/or sensitive, the unauthorized disclosure or use of  
 10 which could be harmful to the party or a third party.

11 3. Attorneys' Eyes Only Material. The following information may be  
 12 designated as Attorneys' Eyes Only Material:

13 a. medical or other private information regarding BNSF's  
 14 current or former employees, including Clift (including but not limited to  
 15 information regarding employee injuries or disabilities and disability  
 16 accommodation requests; which may also warrant a numeric rather than name  
 17 identifier); and

18 b. financial and business information about BNSF's operations  
 19 that is not generally available to the public and is deemed to warrant a higher  
 20 degree of protection than Confidential Material (including, but not limited to,  
 21 trade secrets, sensitive business information, or other confidential research,  
 22 design, development, or commercial information).

23 4. Good Faith Designations; Limitations on Use. In designating  
 24 information as Confidential Material or Attorneys' Eyes Only Material, a  
 25 designating party will make such a designation only as to information that it in  
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1 good faith believes to be confidential, proprietary, and/or sensitive. Information  
2 designated as Confidential Material or Attorneys' Eyes Only Material that is  
3 obtained by any party through discovery in this litigation will be used by such  
4 party and the party's counsel solely for the purpose of conducting this litigation;  
5 this Protective Order does not, however, restrict a party or the party's counsel  
6 from using its knowledge of such information to formulate discovery requests in  
7 other administrative or legal proceedings. Nothing in this Protective Order  
8 restricts a party from disclosing or using, in any manner or for any purpose, any  
9 information from the party's own files that the party itself has designated as  
10 Confidential Material or Attorneys' Eyes Only Material.

11 5. Manner and Timing of Designations. Disclosing parties will  
12 designate information as Confidential Material or Attorneys' Eyes Only  
13 Material as follows:

14 a. In the case of interrogatory answers, responses to requests for  
15 admissions, documents provided in response to document requests, and the  
16 information contained therein, designation will be made before production by  
17 placing the phrase "CONFIDENTIAL MATERIAL" or "ATTORNEYS' EYES  
18 ONLY MATERIAL" on each page that contains such information.

19 b. In the case of depositions, designation of the portion of the  
20 transcript (including exhibits) that contains Confidential Material or Attorneys'  
21 Eyes Only Material must be made by a statement to such effect on the record in  
22 the course of the deposition or, upon review of such transcript, in writing by a  
23 party's counsel within fourteen (14) days after counsel's receipt of the transcript.  
24 During those fourteen (14) days, the entire deposition transcript, including  
25 exhibits, will be treated as Attorney's Eyes Only Material.  
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1           c. Information produced in a non-paper media (*e.g.*, videotape,  
2 audiotape, CD-ROM, DVD-ROM, other digital storage devices) may be  
3 designated Confidential Material or Attorneys' Eyes Only Material by labeling  
4 the outside of such non-paper media as "CONFIDENTIAL MATERIAL" or  
5 "ATTORNEYS' EYES ONLY MATERIAL." In the event a receiving party  
6 generates any "hard copy," transcription, or printout from any such designated  
7 non-paper media, such party must treat each copy, transcription, or printout as  
8 Confidential Material or Attorneys' Eyes Only Material, as appropriate, and  
9 label it in a manner effective to ensure proper treatment.

10           d. In the case of documents or other material to be initially  
11 produced for inspection, unless otherwise expressly designated, all documents  
12 produced for inspection will be treated as Attorneys' Eyes Only Material for a  
13 period not to exceed thirty (30) days after the receiving party inspecting the  
14 documents has indicated the documents it desires to be copied. After a receiving  
15 party inspecting the documents has indicated the documents it desires to be  
16 copied, and before such copies are provided, the producing party will have a  
17 reasonable time, not to exceed the aforementioned thirty (30) business days, to  
18 review the copied documents and designate them as Confidential Material or  
19 Attorneys' Eyes Only Material.

20           e. Information not reduced to documentary or tangible form or  
21 which cannot be conveniently designated as set forth above may be designated  
22 as Confidential Material or Attorneys' Eyes Only Material by informing the  
23 non-designating party in writing.

24           f. In the event that a party inadvertently fails to designate  
25 information as Confidential Material or Attorneys' Eyes Only Material at the  
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1 time of production or as otherwise described above, that party may at any time  
2 thereafter designate such information as Confidential Material or Attorneys'  
3 Eyes Only Material, and such information will be treated as Confidential  
4 Material or Attorneys' Eyes Only Material beginning at the time such  
5 designation occurs.

6 6. Designating Information Disclosed by another Party. If a party  
7 produces or files undesignated information that the receiving or non-filing party  
8 believes should be designated as Confidential Material or Attorneys' Eyes Only  
9 Material, the designating party must provide the party that produced or filed the  
10 undesignated information written notice of the specific information it wishes to  
11 designate, and such information will be treated as Confidential Material or  
12 Attorneys' Eyes Only Material upon receipt of such notice.

13 7. Challenging Designations. A party will not be obligated to  
14 challenge the propriety of a designation at the time made, and failure to do so  
15 will not preclude a subsequent challenge during the pendency of this litigation.  
16 In the event that a party disagrees at any stage of these proceedings with a  
17 designation, the party must provide the designating party with written notice of  
18 its disagreement with the designation. The parties must first meet and confer in  
19 person or by telephone to try to resolve such dispute in good faith on an  
20 informal basis. Any motion regarding designations under this Protective Order  
21 must include a certification that the moving party has made a reasonable and  
22 good faith effort to reach an agreement with opposing counsel on the matters set  
23 forth in the motion. The designating party will have the burden of proving that  
24 information is properly designated for protection under this Protective Order.  
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1           8.     Restrictions on Disclosure of Confidential Material. In the absence  
2 of written permission from the designating party, or an order of the Court, a  
3 receiving party may disclose Confidential Material only to:  
4           a.     Clift;  
5           b.     the agents, officers, or employees (including in house  
6 counsel) of BNSF who work on matters relating to this litigation, with  
7 disclosure only to the extent necessary to perform such work;  
8           c.     internal and external attorneys working on this action on  
9 behalf of a party, including paralegals, assistants, and stenographic and clerical  
10 employees and contractors working under the direct supervision of such  
11 attorneys;  
12           d.     Officers of the Court and supporting personnel, or officers of  
13 any appellate court to which an appeal may be taken or in which review is  
14 sought, including necessary stenographic, videographers, or clerical personnel;  
15           e.     experts or consultants retained or employed (or sought to be  
16 retained or employed) in good faith by a party's attorneys to assist in the  
17 evaluation, prosecution, or defense of this litigation, with disclosure only to the  
18 extent necessary to perform such work;  
19           f.     any person of whom testimony is taken (and their counsel, if  
20 any), except that such person may only be shown Confidential Material in  
21 preparation for and during his or her testimony, and only to the extent that it  
22 relates to his or her testimony, and may not retain any Confidential Material or  
23 copies thereof;  
24           g.     stenographic reporters and videographers engaged for  
25 depositions or other proceedings necessary for the conduct of this case;  
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1 h. outside photocopying services and data processing  
2 companies or individuals engaged by a party or its attorneys to assist in this  
3 litigation (provided that such entities or individuals may not retain any  
4 Confidential Material or copies thereof);

5 i. any person who authored or properly received in the ordinary  
6 course of business the particular information sought to be disclosed (provided  
7 that such persons may not retain any Confidential Material or copies thereof);

8 j. outside independent persons (*i.e.*, persons not currently or  
9 formerly employed by, consulting with, or otherwise associated with any party)  
10 who are retained by a party or its attorneys to provide assistance as mock jurors  
11 or focus group members, provided that such disclosure and any subsequent use  
12 is for purposes relating to this litigation only; and

13 k. insurers of any party and agents of said insurers.

14 9. Restrictions on Disclosure of Attorneys' Eyes Only Material. In the  
15 absence of written permission from the designating party, or an order of the  
16 Court, a receiving party may disclose Attorneys' Eyes Only Material only to:

17 a. internal and external attorneys working on this action on  
18 behalf of a party, including paralegals, assistants, and stenographic and clerical  
19 employees and contractors working under the direct supervision of such  
20 attorneys;

21 b. Officers of the Court and supporting personnel, or officers of  
22 any appellate court to which an appeal may be taken or in which review is  
23 sought, including necessary stenographic, videographers, and clerical personnel;

24 c. stenographic reporters and videographers engaged for  
25 depositions or other proceedings necessary for the conduct of this case;  
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1           d.     any person of whom testimony is taken (and their counsel, if  
2 any), except that such person may only be shown Attorneys' Eyes Only Material  
3 in preparation for and during his or her testimony if it is apparent from the face  
4 of the document, or the surrounding circumstances, that the witness authored or  
5 had legitimate access to and had previously seen the document, provided that if  
6 the disclosure would be based on a party's assertion that the "surrounding  
7 circumstances" suggest that the witness authored or had legitimate access to and  
8 had previously seen the document, the parties' attorneys will consult in a  
9 sidebar, not in the presence of the witness, about that assertion, and attempt to  
10 agree, and in the event of a disagreement, the document will not then be shown  
11 to the witness, subject to further conferring and motion practice and provided  
12 further that the witness may not retain any Attorneys' Eyes Only Material or  
13 copies thereof;

14           e.     any person who is expressly retained or sought to be retained  
15 by a party's attorneys to assist in preparation of this action for trial (including  
16 testimonial experts, non-testimonial experts (who are subject to legitimate work  
17 product doctrine protections) or other trial related consultants (who are subject  
18 to legitimate work product doctrine protections)), with disclosure only to the  
19 extent necessary to perform such work;

20           f.     outside independent persons (*i.e.*, persons not currently or  
21 formerly employed by, consulting with, or otherwise associated with any party)  
22 who are retained by a party or its attorneys to provide assistance as mock jurors  
23 or focus group members, provided that such disclosure and any subsequent use  
24 is for purposes relating to this litigation only;

25           g.     insurers of any party and agents of said insurers; and  
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1           h.       with respect to information designated as Attorneys' Eyes  
2 Only Material by Clift, BNSF may further disclose such information to up to  
3 five (5) officers or employees of BNSF who work on matters relating to this  
4 litigation and who do not directly supervise Clift, with disclosure only to the  
5 extent necessary to perform such work.

6           10.   Acknowledgment and Agreement to be Bound. The persons  
7 described in Paragraphs 8.e., 8.f., 8.j, 8.k, 9.d., 9.e., 9.f, and 9.g will have access  
8 to Confidential Material or Attorneys' Eyes Only Material only after they have  
9 been made aware of the provisions of this Protective Order and have signed a  
10 copy of the "Acknowledgement and Agreement to be Bound" attached hereto as  
11 **Exhibit A.** Copies of the signed Acknowledgement forms will be maintained by  
12 counsel for the parties, and will be available for inspection by the Court at any  
13 time. Persons receiving Confidential Material are enjoined from disclosing such  
14 information to any other person, except in conformance with this Protective  
15 Order.

16           11.   Secure Storage of Designated Information. The recipient of any  
17 Confidential Material or Attorney's Eyes Only Material will maintain such  
18 information in a secure and safe area and will exercise at least the same standard  
19 of due and proper care with respect to the storage, custody, use, and/or  
20 dissemination of such information as is exercised by the recipient with respect to  
21 his, her, or its own confidential information. Designated information will not be  
22 copied, reproduced, summarized, or abstracted, except to the extent reasonably  
23 necessary for the conduct of this lawsuit. All such copies, reproductions,  
24 summarizations, extractions, and abstractions will be subject to the terms of this  
25 Protective Order, and labeled in the same manner as the designated information  
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1 on which they are based.

2 12. Filing Designated Information. If a non-designating party intends to  
3 file Confidential Material or Attorneys' Eyes Only Material with the Court, the  
4 party will endeavor to provide the designating party with sufficient notice of its  
5 intent in advance of the filing to allow the parties to discuss in good faith  
6 whether non-pertinent Confidential Material or Attorneys' Eyes Only Material  
7 could be redacted from the filing, or substitute information that does not contain  
8 Confidential Material or Attorneys' Eyes Only Material could instead be used,  
9 in order to protect the interests of any party or third party. If such notice is not  
10 practicable or if such discussions are unsuccessful, the filing party will  
11 electronically submit Attorneys' Eyes Only Material to the Court only through a  
12 contemporaneous Motion to Seal in accordance with the Court's current  
13 procedures for filing sealed documents in CM/ECF. The moving party will  
14 within the motion show why any information that it designated should be sealed  
15 and/or will indicate that the non-moving party designated the information as  
16 Attorneys' Eyes Only Material and that the moving party has filed the Motion to  
17 Seal in accordance with this Protective Order. A non-moving, designating party  
18 may file a responsive memorandum in support of the Motion to Seal in  
19 accordance with LR 7.1. Nothing in this Protective Order alters or in any way  
20 affects the standards for sealing and/or redacting court records under Fed. R.  
21 Civ. P. 5.2, Fed. R. Civ. P. 26(c), and applicable case law.

22 13. Use of Designated Information in Court Proceedings. In the event  
23 that designated information is used in any court proceeding in connection with  
24 this litigation, it will not lose its Confidential Material or Attorneys' Eyes Only  
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1 Material status through such use, and the parties will take all steps reasonably  
2 required to protect its confidentiality during such use.

3 14. Unrelated Subpoenas or Orders to Produce Designated Information:

4 If a party is served with a subpoena or other process or order issued in an  
5 unrelated proceeding that compels disclosure of information designated by the  
6 other party as Confidential Material or Attorneys' Eyes Only Material, the party  
7 will notify counsel for the designating party in writing within three (3) business  
8 days, include a copy of the subpoena, other process or order, and cooperate with  
9 respect to all reasonable procedures sought to be pursued by the designating  
10 party or any third party whose interests may be affected. The designating party  
11 or third party will have the burden of defending against such subpoena or order.  
12 The party receiving the subpoena or other process or order will be entitled to  
13 comply with it except to the extent the designating party or third party is  
14 successful in obtaining an order modifying or quashing the subpoena or other  
15 process or order.

16 15. Unauthorized Disclosure of Designated Information: If

17 Confidential Material or Attorneys' Eyes Only Material is disclosed to any  
18 person other than in the manner authorized by this Protective Order, the person  
19 responsible for the disclosure must immediately bring all pertinent facts relating  
20 to such disclosure to the attention of counsel for the designating party and,  
21 without prejudice to any other rights and remedies of the parties, make every  
22 effort to prevent further disclosure.

23 16. Inadvertent Production or Disclosure of Privileged Information. If a

24 producing party gives notice to a receiving party that certain inadvertently  
25 produced information is subject to a claim of privilege or other protection, the  
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1 obligations of the receiving party are those set forth in Fed. R. Civ. P.  
2 26(b)(5)(B). Pursuant to Fed. R. Evid. 502(d), inadvertent disclosure of a  
3 communication or information subject to the attorney work product doctrine, the  
4 attorney-client privilege, or other legal privilege or protection will not constitute  
5 a waiver of the privilege or protection for purposes of this proceeding or any  
6 other proceeding in any other court.

7 17. Privilege Logs. A party will produce a privilege log within 30 days  
8 after its first production of documents for which privilege is asserted to apply,  
9 and within the same time period following any subsequent or rolling  
10 productions. The parties are not required to include on their respective privilege  
11 logs any attorney-client privileged communications that occurred after Clift filed  
12 his underlying complaint with the U.S. Department of Labor, Occupational  
13 Safety & Health Administration Region 10 on April 11, 2011 (Case No. 0-1060-  
14 11-036), or any materials protected by the attorney work product doctrine that  
15 were prepared after such time.

16 18. Termination and Destruction of Designated Information. Within  
17 sixty (60) days of the termination of this action, including all appeals, each  
18 receiving party must certify the destruction of all Confidential Material or  
19 Attorneys' Eyes Only Material produced by the designating party, including all  
20 copies, extracts, and summaries thereof. Counsel for each party will be entitled  
21 to retain one archival copy of all documents filed with the Court, trial,  
22 deposition, and hearing transcripts, correspondence, deposition and trial  
23 exhibits, expert reports, attorney work product, and consultant and expert work  
24 product, even if such materials contain designated information. In order to  
25 preserve the ability of counsel to defend against any potential malpractice  
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1 claims, counsel for each party will retain one complete set of all information  
2 designated as Confidential Material or Attorneys' Eyes Only Material by its  
3 client for a period of at least three (3) years after the termination of this action,  
4 including all appeals. If counsel receives written notice of any malpractice claim  
5 against the other party's counsel during this period, it will continue to retain and  
6 will not destroy such information until after the termination of all such  
7 malpractice claims, including any appeals.

8 19. Survival. The terms, conditions, and limitations of this Protective  
9 Order will survive the termination of this action.

10 20. Requests for Relief from Protective Order. This Protective Order is  
11 without prejudice to the right of any party to seek relief from the Court, upon  
12 good cause shown, from any of the provisions contained herein.

13 21. Construction. This Protective Order will not be construed as  
14 waiving any right to assert a claim of privilege, relevance, over breadth,  
15 burdensomeness, or other grounds for not producing material called for, and  
16 access to such material will be only as otherwise provided by the discovery rules  
17 and other applicable law. Subject to the terms of this Protective Order, nothing  
18 herein shall be construed in any manner as limiting the ability of any party to  
19 use Confidential Material or Attorneys' Eyes Only Material in the prosecution  
20 or defense of any claim, motion, or other proceeding in this litigation.

21 It is so ORDERED:

22 Dated this 22nd day of September, 2014.

23  
24 *s/Lonny R. Suko*

25 \_\_\_\_\_  
26 Lonny R. Suko  
Senior United States District Judge

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5 By s/Ryan D. Redekopp  
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16 BNSF Railway Company

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**EXHIBIT A**

**ACKNOWLEDGEMENT AND AGREEMENT TO BE BOUND**

1. I hereby acknowledge that I have read in its entirety the Stipulated Protective Order Regarding Handling of Confidential Material entered in *Clift v. BNSF Railway Co.*, No. 2:14-cv-00152-LRS (the "Protective Order").

2. I agree to comply with and be bound by the Protective Order with respect to any documents, materials, or information designated as Confidential Material that are furnished to me.

3. I understand that I may not disclose in any manner any Confidential Material to any person or entity except in strict compliance with the Protective Order, and that I may not make any copies, extracts, or summaries of Confidential Material except in accordance with the Protective Order.

4. I agree to submit to venue and jurisdiction in the United States District Court for the Eastern District of Washington with regard to any proceedings to enforce the terms of the Protective Order, even if such enforcement proceedings occur after termination of this action.

Printed Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

STIPULATED PROTECTIVE ORDER  
REGARDING HANDLING OF CONFIDENTIAL  
MATERIAL - 16

Case No. 2:14-cv-00152-LRS

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